

AMENDED IN ASSEMBLY MARCH 19, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 765

Introduced by Assembly Member Ammiano

February 21, 2013

An act to amend Section 1170 of the Penal Code, relating to sentencing.

LEGISLATIVE COUNSEL'S DIGEST

AB 765, as amended, Ammiano. Sentencing.

Existing law, operative January 1, 2014, provides that when a judgment of imprisonment is to be imposed and the statute specifies 3 possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. Existing law, operative January 1, 2014, provides that the court shall state the reasons for its sentence choice on the record at the time of sentencing.

This bill would additionally provide that the court may not impose an upper term based on aggravating facts unless the facts were first presented to the factfinder and the factfinder found the facts to be true. The bill would require the court to include, at the time it makes its on the record statement of the reasons for its sentence choice, the specific facts in aggravation, if any, it relied upon in imposing an upper term.

The bill would state findings and declarations of the Legislature in connection with imposing upper term sentences.

~~Existing law sets forth legislative findings establishing that the purpose of imprisonment for crimes is punishment and that this purpose is best served by terms proportionate to the seriousness of the offense~~

~~with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.~~

~~This bill would make technical, nonsubstantive changes to those provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1170 of the Penal Code, as amended by
2 Section 2 of Chapter 828 of the Statutes of 2012, is amended to
3 read:

4 1170. (a) (1) The Legislature finds and declares that the
5 purpose of imprisonment for crime is punishment. This purpose
6 is best served by terms that are proportionate to the seriousness of
7 the offense with provision for uniformity in the sentences of
8 offenders committing the same offense under similar
9 circumstances. *The Legislature further finds and declares that, to*
10 *ensure proportionality in sentencing, upper terms should be*
11 *reserved for individual cases in which aggravating facts exist and*
12 *have been proven to be true.* The Legislature further finds and
13 declares that the elimination of disparity and the provision of
14 uniformity of sentences can best be achieved by determinate
15 sentences fixed by statute in proportion to the seriousness of the
16 offense as determined by the Legislature to be imposed by the
17 court with specified discretion.

18 (2) Notwithstanding paragraph (1), the Legislature further finds
19 and declares that programs should be available for inmates,
20 including, but not limited to, educational programs, that are
21 designed to prepare nonviolent felony offenders for successful
22 reentry into the community. The Legislature encourages the
23 development of policies and programs designed to educate and
24 rehabilitate nonviolent felony offenders. In implementing this
25 section, the Department of Corrections and Rehabilitation is
26 encouraged to give priority enrollment in programs to promote
27 successful return to the community to an inmate with a short
28 remaining term of commitment and a release date that would allow
29 him or her adequate time to complete the program.

30 (3) In any case in which the punishment prescribed by statute
31 for a person convicted of a public offense is a term of imprisonment

1 in the state prison of any specification of three time periods, the
2 court shall sentence the defendant to one of the terms of
3 imprisonment specified unless the convicted person is given any
4 other disposition provided by law, including a fine, jail, probation,
5 or the suspension of imposition or execution of sentence or is
6 sentenced pursuant to subdivision (b) of Section 1168 because he
7 or she committed his or her crime prior to July 1, 1977. In
8 sentencing the convicted person, the court shall apply the
9 sentencing rules of the Judicial Council. The court, unless it
10 determines that there are circumstances in mitigation of the
11 punishment prescribed, shall also impose any other term that it is
12 required by law to impose as an additional term. Nothing in this
13 article shall affect any provision of law that imposes the death
14 penalty, that authorizes or restricts the granting of probation or
15 suspending the execution or imposition of sentence, or expressly
16 provides for imprisonment in the state prison for life, except as
17 provided in paragraph (2) of subdivision (d). In any case in which
18 the amount of preimprisonment credit under Section 2900.5 or any
19 other provision of law is equal to or exceeds any sentence imposed
20 pursuant to this chapter, the entire sentence shall be deemed to
21 have been served and the defendant shall not be actually delivered
22 to the custody of the secretary. The court shall advise the defendant
23 that he or she shall serve a period of parole and order the defendant
24 to report to the parole office closest to the defendant's last legal
25 residence, unless the in-custody credits equal the total sentence,
26 including both confinement time and the period of parole. The
27 sentence shall be deemed a separate prior prison term under Section
28 667.5, and a copy of the judgment and other necessary
29 documentation shall be forwarded to the secretary.

30 (b) When a judgment of imprisonment is to be imposed and the
31 statute specifies three possible terms, the court shall order
32 imposition of the middle term, unless there are circumstances in
33 aggravation or mitigation of the crime. At least four days prior to
34 the time set for imposition of judgment, either party or the victim,
35 or the family of the victim if the victim is deceased, may submit
36 a statement in aggravation or mitigation to dispute facts in the
37 record or the probation officer's report, or to present additional
38 facts. In determining whether there are circumstances that justify
39 imposition of the upper or lower term, the court may consider the
40 record in the case, the probation officer's report, other reports,

1 including reports received pursuant to Section 1203.03, and
2 statements in aggravation or mitigation submitted by the
3 prosecution, the defendant, or the victim, or the family of the victim
4 if the victim is deceased, and any further evidence introduced at
5 the sentencing hearing. The court shall set forth on the record the
6 facts and reasons for imposing the upper or lower term. The court
7 may not impose an upper term by using the fact of any
8 enhancement upon which sentence is imposed under any provision
9 of law. *Additionally, the court may not impose an upper term based*
10 *on aggravating facts unless the facts were first presented to the*
11 *factfinder and the factfinder found the facts to be true.* A term of
12 imprisonment shall not be specified if imposition of sentence is
13 suspended.

14 (c) The court shall state the reasons for its sentence choice on
15 the record at the time of ~~sentencing~~. *sentencing, including the*
16 *specific facts in aggravation, if any, the court relied upon to impose*
17 *an upper term.* The court shall also inform the defendant that as
18 part of the sentence after expiration of the term he or she may be
19 on parole for a period as provided in Section 3000.

20 (d) (1) When a defendant subject to this section or subdivision
21 (b) of Section 1168 has been sentenced to be imprisoned in the
22 state prison and has been committed to the custody of the secretary,
23 the court may, within 120 days of the date of commitment on its
24 own motion, or at any time upon the recommendation of the
25 secretary or the Board of Parole Hearings, recall the sentence and
26 commitment previously ordered and resentence the defendant in
27 the same manner as if he or she had not previously been sentenced,
28 provided the new sentence, if any, is no greater than the initial
29 sentence. The court resentencing under this subdivision shall apply
30 the sentencing rules of the Judicial Council so as to eliminate
31 disparity of sentences and to promote uniformity of sentencing.
32 Credit shall be given for time served.

33 (2) (A) (i) When a defendant who was under 18 years of age
34 at the time of the commission of the offense for which the
35 defendant was sentenced to imprisonment for life without the
36 possibility of parole has served at least 15 years of that sentence,
37 the defendant may submit to the sentencing court a petition for
38 recall and resentencing.

39 (ii) Notwithstanding clause (i), this paragraph shall not apply
40 to defendants sentenced to life without parole for an offense where

1 the defendant tortured, as described in Section 206, his or her
2 victim or the victim was a public safety official, including any law
3 enforcement personnel mentioned in Chapter 4.5 (commencing
4 with Section 830) of Title 3, or any firefighter as described in
5 Section 245.1, as well as any other officer in any segment of law
6 enforcement who is employed by the federal government, the state,
7 or any of its political subdivisions.

8 (B) The defendant shall file the original petition with the
9 sentencing court. A copy of the petition shall be served on the
10 agency that prosecuted the case. The petition shall include the
11 defendant's statement that he or she was under 18 years of age at
12 the time of the crime and was sentenced to life in prison without
13 the possibility of parole, the defendant's statement describing his
14 or her remorse and work towards rehabilitation, and the defendant's
15 statement that one of the following is true:

16 (i) The defendant was convicted pursuant to felony murder or
17 aiding and abetting murder provisions of law.

18 (ii) The defendant does not have juvenile felony adjudications
19 for assault or other felony crimes with a significant potential for
20 personal harm to victims prior to the offense for which the sentence
21 is being considered for recall.

22 (iii) The defendant committed the offense with at least one adult
23 codefendant.

24 (iv) The defendant has performed acts that tend to indicate
25 rehabilitation or the potential for rehabilitation, including, but not
26 limited to, availing himself or herself of rehabilitative, educational,
27 or vocational programs, if those programs have been available at
28 his or her classification level and facility, using self-study for
29 self-improvement, or showing evidence of remorse.

30 (C) If any of the information required in subparagraph (B) is
31 missing from the petition, or if proof of service on the prosecuting
32 agency is not provided, the court shall return the petition to the
33 defendant and advise the defendant that the matter cannot be
34 considered without the missing information.

35 (D) A reply to the petition, if any, shall be filed with the court
36 within 60 days of the date on which the prosecuting agency was
37 served with the petition, unless a continuance is granted for good
38 cause.

39 (E) If the court finds by a preponderance of the evidence that
40 the statements in the petition are true, the court shall hold a hearing

1 to consider whether to recall the sentence and commitment
2 previously ordered and to resentence the defendant in the same
3 manner as if the defendant had not previously been sentenced,
4 provided that the new sentence, if any, is not greater than the initial
5 sentence. Victims, or victim family members if the victim is
6 deceased, shall retain the rights to participate in the hearing.

7 (F) The factors that the court may consider when determining
8 whether to recall and resentence include, but are not limited to,
9 the following:

10 (i) The defendant was convicted pursuant to felony murder or
11 aiding and abetting murder provisions of law.

12 (ii) The defendant does not have juvenile felony adjudications
13 for assault or other felony crimes with a significant potential for
14 personal harm to victims prior to the offense for which the sentence
15 is being considered for recall.

16 (iii) The defendant committed the offense with at least one adult
17 codefendant.

18 (iv) Prior to the offense for which the sentence is being
19 considered for recall, the defendant had insufficient adult support
20 or supervision and had suffered from psychological or physical
21 trauma, or significant stress.

22 (v) The defendant suffers from cognitive limitations due to
23 mental illness, developmental disabilities, or other factors that did
24 not constitute a defense, but influenced the defendant's
25 involvement in the offense.

26 (vi) The defendant has performed acts that tend to indicate
27 rehabilitation or the potential for rehabilitation, including, but not
28 limited to, availing himself or herself of rehabilitative, educational,
29 or vocational programs, if those programs have been available at
30 his or her classification level and facility, using self-study for
31 self-improvement, or showing evidence of remorse.

32 (vii) The defendant has maintained family ties or connections
33 with others through letter writing, calls, or visits, or has eliminated
34 contact with individuals outside of prison who are currently
35 involved with crime.

36 (viii) The defendant has had no disciplinary actions for violent
37 activities in the last five years in which the defendant was
38 determined to be the aggressor.

39 (G) The court shall have the discretion to recall the sentence
40 and commitment previously ordered and to resentence the

1 defendant in the same manner as if the defendant had not
2 previously been sentenced, provided that the new sentence, if any,
3 is not greater than the initial sentence. The discretion of the court
4 shall be exercised in consideration of the criteria in subparagraph
5 (F). Victims, or victim family members if the victim is deceased,
6 shall be notified of the resentencing hearing and shall retain their
7 rights to participate in the hearing.

8 (H) If the sentence is not recalled, the defendant may submit
9 another petition for recall and resentencing to the sentencing court
10 when the defendant has been committed to the custody of the
11 department for at least 20 years. If recall and resentencing is not
12 granted under that petition, the defendant may file another petition
13 after having served 24 years. The final petition may be submitted,
14 and the response to that petition shall be determined, during the
15 25th year of the defendant's sentence.

16 (I) In addition to the criteria in subparagraph (F), the court may
17 consider any other criteria that the court deems relevant to its
18 decision, so long as the court identifies them on the record,
19 provides a statement of reasons for adopting them, and states why
20 the defendant does or does not satisfy the criteria.

21 (J) This subdivision shall have retroactive application.

22 (e) (1) Notwithstanding any other law and consistent with
23 paragraph (1) of subdivision (a), if the secretary or the Board of
24 Parole Hearings or both determine that a prisoner satisfies the
25 criteria set forth in paragraph (2), the secretary or the board may
26 recommend to the court that the prisoner's sentence be recalled.

27 (2) The court shall have the discretion to resentence or recall if
28 the court finds that the facts described in subparagraphs (A) and
29 (B) or subparagraphs (B) and (C) exist:

30 (A) The prisoner is terminally ill with an incurable condition
31 caused by an illness or disease that would produce death within
32 six months, as determined by a physician employed by the
33 department.

34 (B) The conditions under which the prisoner would be released
35 or receive treatment do not pose a threat to public safety.

36 (C) The prisoner is permanently medically incapacitated with
37 a medical condition that renders him or her permanently unable
38 to perform activities of basic daily living, and results in the prisoner
39 requiring 24-hour total care, including, but not limited to, coma,
40 persistent vegetative state, brain death, ventilator-dependency, loss

1 of control of muscular or neurological function, and that
2 incapacitation did not exist at the time of the original sentencing.

3 The Board of Parole Hearings shall make findings pursuant to
4 this subdivision before making a recommendation for resentence
5 or recall to the court. This subdivision does not apply to a prisoner
6 sentenced to death or a term of life without the possibility of parole.

7 (3) Within 10 days of receipt of a positive recommendation by
8 the secretary or the board, the court shall hold a hearing to consider
9 whether the prisoner's sentence should be recalled.

10 (4) Any physician employed by the department who determines
11 that a prisoner has six months or less to live shall notify the chief
12 medical officer of the prognosis. If the chief medical officer
13 concurs with the prognosis, he or she shall notify the warden.
14 Within 48 hours of receiving notification, the warden or the
15 warden's representative shall notify the prisoner of the recall and
16 resentencing procedures, and shall arrange for the prisoner to
17 designate a family member or other outside agent to be notified
18 as to the prisoner's medical condition and prognosis, and as to the
19 recall and resentencing procedures. If the inmate is deemed
20 mentally unfit, the warden or the warden's representative shall
21 contact the inmate's emergency contact and provide the information
22 described in paragraph (2).

23 (5) The warden or the warden's representative shall provide the
24 prisoner and his or her family member, agent, or emergency
25 contact, as described in paragraph (4), updated information
26 throughout the recall and resentencing process with regard to the
27 prisoner's medical condition and the status of the prisoner's recall
28 and resentencing proceedings.

29 (6) Notwithstanding any other provisions of this section, the
30 prisoner or his or her family member or designee may
31 independently request consideration for recall and resentencing
32 by contacting the chief medical officer at the prison or the
33 secretary. Upon receipt of the request, the chief medical officer
34 and the warden or the warden's representative shall follow the
35 procedures described in paragraph (4). If the secretary determines
36 that the prisoner satisfies the criteria set forth in paragraph (2), the
37 secretary or board may recommend to the court that the prisoner's
38 sentence be recalled. The secretary shall submit a recommendation
39 for release within 30 days in the case of inmates sentenced to
40 determinate terms and, in the case of inmates sentenced to

1 indeterminate terms, the secretary shall make a recommendation
2 to the Board of Parole Hearings with respect to the inmates who
3 have applied under this section. The board shall consider this
4 information and make an independent judgment pursuant to
5 paragraph (2) and make findings related thereto before rejecting
6 the request or making a recommendation to the court. This action
7 shall be taken at the next lawfully noticed board meeting.

8 (7) Any recommendation for recall submitted to the court by
9 the secretary or the Board of Parole Hearings shall include one or
10 more medical evaluations, a postrelease plan, and findings pursuant
11 to paragraph (2).

12 (8) If possible, the matter shall be heard before the same judge
13 of the court who sentenced the prisoner.

14 (9) If the court grants the recall and resentencing application,
15 the prisoner shall be released by the department within 48 hours
16 of receipt of the court's order, unless a longer time period is agreed
17 to by the inmate. At the time of release, the warden or the warden's
18 representative shall ensure that the prisoner has each of the
19 following in his or her possession: a discharge medical summary,
20 full medical records, state identification, parole medications, and
21 all property belonging to the prisoner. After discharge, any
22 additional records shall be sent to the prisoner's forwarding
23 address.

24 (10) The secretary shall issue a directive to medical and
25 correctional staff employed by the department that details the
26 guidelines and procedures for initiating a recall and resentencing
27 procedure. The directive shall clearly state that any prisoner who
28 is given a prognosis of six months or less to live is eligible for
29 recall and resentencing consideration, and that recall and
30 resentencing procedures shall be initiated upon that prognosis.

31 (f) Notwithstanding any other provision of this section, for
32 purposes of paragraph (3) of subdivision (h), any allegation that
33 a defendant is eligible for state prison due to a prior or current
34 conviction, sentence enhancement, or because he or she is required
35 to register as a sex offender shall not be subject to dismissal
36 pursuant to Section 1385.

37 (g) A sentence to state prison for a determinate term for which
38 only one term is specified, is a sentence to state prison under this
39 section.

1 (h) (1) Except as provided in paragraph (3), a felony punishable
2 pursuant to this subdivision where the term is not specified in the
3 underlying offense shall be punishable by a term of imprisonment
4 in a county jail for 16 months, or two or three years.

5 (2) Except as provided in paragraph (3), a felony punishable
6 pursuant to this subdivision shall be punishable by imprisonment
7 in a county jail for the term described in the underlying offense.

8 (3) Notwithstanding paragraphs (1) and (2), where the defendant
9 (A) has a prior or current felony conviction for a serious felony
10 described in subdivision (c) of Section 1192.7 or a prior or current
11 conviction for a violent felony described in subdivision (c) of
12 Section 667.5, (B) has a prior felony conviction in another
13 jurisdiction for an offense that has all the elements of a serious
14 felony described in subdivision (c) of Section 1192.7 or a violent
15 felony described in subdivision (c) of Section 667.5, (C) is required
16 to register as a sex offender pursuant to Chapter 5.5 (commencing
17 with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime
18 and as part of the sentence an enhancement pursuant to Section
19 186.11 is imposed, an executed sentence for a felony punishable
20 pursuant to this subdivision shall be served in state prison.

21 (4) Nothing in this subdivision shall be construed to prevent
22 other dispositions authorized by law, including pretrial diversion,
23 deferred entry of judgment, or an order granting probation pursuant
24 to Section 1203.1.

25 (5) The court, when imposing a sentence pursuant to paragraph
26 (1) or (2) of this subdivision, may commit the defendant to county
27 jail as follows:

28 (A) For a full term in custody as determined in accordance with
29 the applicable sentencing law.

30 (B) (i) For a term as determined in accordance with the
31 applicable sentencing law, but suspend execution of a concluding
32 portion of the term selected in the court's discretion, during which
33 time the defendant shall be supervised by the county probation
34 officer in accordance with the terms, conditions, and procedures
35 generally applicable to persons placed on probation, for the
36 remaining unserved portion of the sentence imposed by the court.
37 The period of supervision shall be mandatory, and may not be
38 earlier terminated except by court order. Any proceeding to revoke
39 or modify mandatory supervision under this subparagraph shall
40 be conducted pursuant to either subdivisions (a) and (b) of Section

1 1203.2 or Section 1203.3. During the period when the defendant
2 is under such supervision, unless in actual custody related to the
3 sentence imposed by the court, the defendant shall be entitled to
4 only actual time credit against the term of imprisonment imposed
5 by the court. Any time period which is suspended because a person
6 has absconded shall not be credited toward the period of
7 supervision.

8 (ii) The portion of a defendant's sentenced term during which
9 time he or she is supervised by the county probation officer
10 pursuant to this subparagraph shall be known as mandatory
11 supervision.

12 (6) The sentencing changes made by the act that added this
13 subdivision shall be applied prospectively to any person sentenced
14 on or after October 1, 2011.

15 (i) This section shall become operative on January 1, 2014.